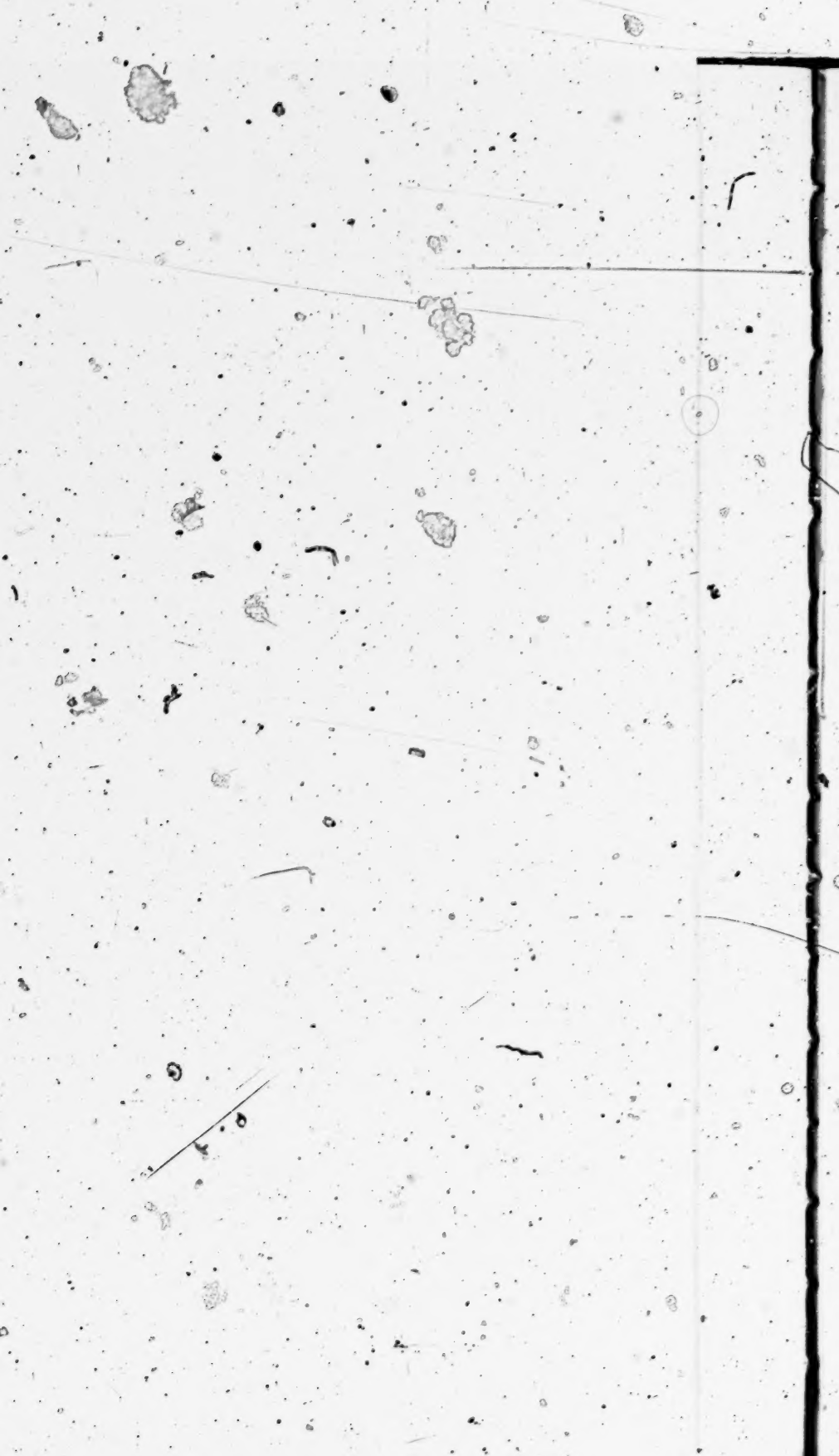

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 481

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee),

Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY (Appellant),

Respondent.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee),

Petitioner,

vs.

THE OHIO OIL COMPANY (Appellant),

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit and

BRIEF IN SUPPORT THEREOF.

RUSSELL L. DEARMONT,
THOS. T. RAILEY,
Attorneys for Petitioner.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Guy A. Thompson, Trustee, Missouri-Illinois Railroad Company, Debtor (appellee in the court below), respectfully presents:

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review the decision and decree made and entered in said

Circuit Court of Appeals on August 29th and September 5th, 1939, respectively (Sanborn and Thomas, Circuit Judges, and Sullivan, District Judge, sitting), by which an interlocutory decree of the District Court, sitting as a Court of Bankruptcy, was reversed in consolidated cases, wherein Magnolia Petroleum Co. and Ohio Oil Co., respectively, were appellants and petitioner was appellee, bearing Court of Appeals docket numbers 11,410 to 11,413, inclusive.

On application of petitioner, the issuance of the mandate of the Circuit Court of Appeals was stayed to afford petitioner an opportunity to apply to this Court for writ of certiorari.

STATEMENT.

Petitioner is the duly appointed, qualified and acting Trustee of Missouri-Illinois Railroad Company, a subsidiary debtor in the reorganization proceedings of Missouri Pacific Railroad Company, pending in the United States District Court for the Eastern Division, Eastern Judicial District of Missouri, under the provisions of Section 77 of the Bankruptcy Act.

The line of the Missouri-Illinois Railroad traverses the recently proven Salem oil field in Marion County, Illinois. Adverse claims to the oil underlying the right of way were asserted by Magnolia Petroleum Company and Ohio Oil Company, predicated upon certain alleged leases, on the theory that petitioner has a mere easement in the railroad right of way. Petitioner has contended and now contends that the deeds to his predecessor in interest respecting the strip of land on which the railroad is situated conveyed the fee-simple title, including oil and mineral rights. The controversy primarily concerns the interpretation of the granting clause of these warranty deeds,

which conveyed to Trustee's predecessor in interest "*a strip of ground for right of way of said Railroad Company.*"

It seemed apparent that these contentions would result in prolonged litigation, during which time the oil would be drained from under the right of way into nearby wells, thus resulting in a serious loss to the trust estate in the event Trustee's claim to title be upheld. Trustee therefore petitioned the bankruptcy court for an order permitting the oil to be removed from the right of way, the proceeds from the sale thereof, after defraying the expenses of drilling, conserving, and selling the oil, to be impounded as a trust fund for the account of whom concerned, pending final determination of the controversy.

Magnolia Petroleum Company and Ohio Oil Company entered their appearance, and the Bankruptcy Court, after hearing testimony respecting the probability of the oil being rapidly drained from under the right of way, found this to be a fact, and that it justified the immediate drilling of wells for the conservation of the oil (R. 58). The Court accordingly ordered that the proceeds of the oil so removed from the right of way be impounded; ordered other possible adverse claimants brought in by publication; and retained jurisdiction to hear further evidence and determine adverse claims to title (R. 59-61).

Magnolia Petroleum Company and Ohio Oil Company appealed from this *interlocutory decree* on the theory that the deeds upon which Trustee relied conveyed, by their granting clauses, a mere easement for railroad purposes, and that the Trustee therefore was in neither actual nor constructive possession of the underlying minerals.

The Court of Appeals sustained this contention and held that the Bankruptcy Court was without jurisdiction over the parties or subject matter of the litigation (R. 183, 184).

JURISDICTION.

This petition for writ of certiorari is prosecuted pursuant to the provisions of Section 240 of the *Judicial Code (Title 28, Section 347, U. S. Code)* and *Section 24* of the *Bankruptcy Act* [*Chandler Bill, Title 11, Section 47 (c), U. S. Code*].

There are involved matters of general importance respecting the jurisdiction of the bankruptcy courts and their authority to enter appropriate orders conserving perishable and fugitive substances in litigation pending determination of actual or constructive possession of the *res* by trustees in bankruptcy. Petitioner further contends that the decision sought to be reviewed is in direct conflict with controlling decisions of the State of Illinois; is in conflict with authoritative decisions of this Court; and in at least one respect is in conflict with the rulings of the Circuit of Appeals of the Fifth Circuit, as hereinafter more fully stated.

The opinion and decree of the Circuit Court of Appeals sought to be reviewed were filed August 29th and September 5th, 1939, respectively (R. 165, 184). Petition for rehearing was filed September 18, 1939 (R. 187), and the Court's order denying said petition for rehearing was filed September 26, 1939 (R. 187).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The primary questions presented by this petition are summarized as follows:

(1) The Court of Appeals held that the petition on its face showed that the petitioner was not in possession, actual or constructive, of the underlying oil rights, and directed the court below to dismiss the petition for want

of jurisdiction (R. 183). Whether the granting clauses of these deeds, which were quoted verbatim in Trustee's petition, conveyed the fee absolute or merely a railroad easement presented an intricate question of law, and a question upon which Trustee should have been permitted to offer evidence showing the interpretation of the deeds by the grantors and their successors in interest. Pending determination of these questions of fact and law and their review by the Appellate Courts, the lower court had jurisdiction to enter an appropriate order conserving the subject matter of the litigation. It is accordingly the contention of petitioner that the lower court had jurisdiction to act pending determination of the question of possession, and that the decision of the Court of Appeals to the contrary is in conflict with such authoritative decisions of this Court as *Traubel-Scott-Kitzmiller Co. v. Fox*, 264 U. S. 426, 432.

(2) It is inadvertently stated in the opinion sought to be reviewed that counsel "also agree that if the deeds grant and convey a railroad right-of-way easement only, such possession did not extend either actually or constructively to the oil and gas underlying the right of way" (R. 172). This is not quite correct. What counsel did verbally admit was that under the Illinois decisions, a railroad which had a mere easement did not hold adversely to the owners of the fee within the contemplation of the statute granting title by adverse possession. Petitioner most earnestly insists that a railroad easement constitutes possession of both the surface and the subsoil. It is, as stated by this Court, a fee, the use of which is limited to railroad purposes with right of reverter when the use for railroad purposes has ended. The owner of a railroad easement may be in possession of the subsoil so as to give the Bankruptcy Court jurisdiction without that possession being adverse to the constructive rights of the owners of

the underlying minerals. To give the Bankruptcy Court jurisdiction to pass upon the merits of this controversy, it suffices to prove *possession* without the necessity of proving *adverse possession.* Petitioner would therefore present to this Court for determination the important question of whether possession of a railroad easement by a trustee in bankruptcy constitutes such possession of the subsoil and of the water, oil and other fugitive substances found therein as to vest the Bankruptcy Court with jurisdiction to determine questions respecting title.

(3) In the decision sought to be reviewed, it is conceded by the Court of Appeals that the Illinois decisions are controlling (R. 173), and that these decisions are to the effect that any ambiguity in the granting clause is to be resolved in favor of the grantee (R. 175) and against any limitation of the fee (R. 175-179). (*Rockford Trust Co. v. Moon*, 370 Ill. 250, 18 N. E. [2] 447; *Weihe v. Lorenz*, 254 Ill. 195, 98 N. E. 268; *Downen v. Rayburn*, 214 Ill. 342, 73 N. E. 364; *Tinker v. Forbes*, 136 Ill. 221, 26 N. E. 504; *Warren County v. Patterson*, 56 Ill. 111; *Noyes v. St. L. A. & T. H. R. R. Co.*, 21 N. E. 487.) The Court of Appeals has erred in failing to follow these authoritative Illinois decisions and in erroneously holding that they are not applicable to the conveyances in question for the alleged, and we think misconceived, reason that the conveyance of a railroad right-of-way easement is to be distinguished from the conveyance of the fee subject to limitations or conditions. The Supreme Court of Illinois, in the cases cited, in construing the grant of a strip of land "*for alley purposes,*" a tract of land "*for schoolhouse,*" certain lots "*for the purpose of locating the proper water wheels and races to draw said water,*" a tract or parcel of land "*to be used as a church location,*" and a tract of land "*for the erection and maintenance thereon of said tracks, turnouts, switches, fixtures and buildings, and for such other gen-*

eral railroad purposes as may be necessary and convenient for said company," has in each instance held that the language following the grant is merely descriptive of the use and not a limitation of the fee. These authoritative rulings are specifically admitted in the opinion of the Court of Appeals (R. 177), but the Court has erroneously failed to follow them.

(4) In failing to follow the authoritative decisions of the Supreme Court of Illinois last aforesaid and in attempting to distinguish a railroad easement from the conveyances referred to in these Illinois authorities dealing with limitations of fees, the Court of Appeals in the decision sought to be reviewed has ignored and is in conflict with such authoritative decisions of this Court as *Rio Grande Western Ry. Co. v. Stringham*, 239 U. S. 44, 47, and *Kern River Co. v. U. S.*, 257 U. S. 147, 151, to the effect that a railroad or drainage right of way "is neither a mere easement, nor a fee simple absolute, but *a limited fee*, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted." In other words, the Court of Appeals has erred in failing to hold that the grant of a railroad right of way is nothing more nor less than a limited fee in the nature of an easement, and has accordingly erred in failing to apply the foregoing authoritative Illinois decisions in construing the conveyances in question.

(5) The Rusler deed, unlike the others, contained the following supplemental description, to wit: "it being the strip of land over and across said above-described tracts of land where the said railroad is now located" (R. 167). In construing this language in the decision sought to be reviewed (R. 176), the Court's interpretation is in direct conflict with the interpretation of a similar deed by the

Circuit Court of Appeals of the Fifth Circuit in *Kynard v. Halen*, 5 Fed. (2) 160, 162.

Wherefore, petitioner, referring to the attached brief in support of the foregoing reasons for review, respectfully prays that this Court issue a writ of certiorari directed to the United States Circuit Court of Appeals for the Eighth Circuit to certify and send to this Court a full and complete transcript of the record herein, bearing the Court of Appeals docket numbers 11,410 to 11,413, inclusive, consolidated, to the end that the said case may be reviewed and determined by this Court as provided by law, and that the decision of the Circuit Court of Appeals may be reversed, and that your petitioner may have such other and further relief in the premises as to this Court may seem just and proper.

GUY A. THOMPSON,
Trustee, Missouri-Illinois Railroad Company,
Debtor,

By RUSSELL L. DEARMONT,
THOS. T. RAILEY,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF FOREGOING PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Thirteen oil wells have been drilled by petitioner on the right of way of Missouri-Illinois Railroad through the Salem oil field pursuant to orders of the Bankruptcy Court. As of September 1, 1939, the money received from the sale of oil and impounded in a special account awaiting directions of the Bankruptcy Court aggregated $472,000, of which, pursuant to orders of court, approximately $225,000 has been spent for drilling, producing and marketing the oil from these wells. It has been estimated that the total value of the oil available to be drawn from this right of way approximates one million dollars. We emphasize these facts, which are not in the record, merely to impress upon the Court the importance of this litigation.

CONTROLLING ILLINOIS DECISIONS DISREGARDED.

The principal issue here involved is thus stated in the opinion of the Court of Appeals now sought to be reviewed, to wit (R. 173):

> "The question to be answered is whether a warranty deed conveying to a railroad 'a strip of ground (land) 60 (66) ft. wide for right of way for said railroad company over and across' a larger tract of land vests a fee-simple title in the grantee or only a railroad right of way easement."

In expressing its ultimate conclusion on this issue the Court of Appeals in its opinion says (R. 176):

> "An examination of the deeds under consideration, *with the Illinois law and rules of construction in*

mind, is, we think, convincing that in each of them the clear intent, expressly stated, was to convey to the Railroad Company only a right-of-way easement for its railroad, and not a fee."

The fallacy of this conclusion is that the Court of Appeals did not keep "*the Illinois law and rules of construction in mind*," or at least did not apply these rules or give them the weight that is required by the decisions of this Court with respect to matters where the state decisions are controlling. Under the authoritative Illinois decisions it is well settled that in the construction of deeds all doubt should be resolved in favor of the grantee and in favor of the free use of the property as against conditions, restrictions and limitations. Following these principles the Supreme Court of Illinois, as admitted in the opinion under consideration (R. 177-179), has held that the descriptive phrases hereinafter referred to are not limitations or conditions imposed upon the fee, to wit:

(a) Conveyance of a strip 10 feet wide "*for alley purposes*" (*Weihe v. Lorenz*, 254 Ill. 195, 98 N. E. 268).

(b) The granting of a lot "*for the purpose of locating a proper water wheel and races to draw said water*" (*Tinker v. Forbes*, 136 Ill. 221, 26 N. E. 503).

(c) Conveyance of a certain tract or parcel of land "*to be used as a church location*" (*Deiwen v. Rayburn*, 214 Ill. 342, 73 N. E. 364).

(d) Conveyance of a tract of land to a railroad company "*for the erection and maintenance thereon of the freight house of said companies, or either of them, together with said tracks, turn-outs, switches, fixtures, and buildings, and for such other general railroad purposes as may be necessary and convenient for said company*" (*Noyes v. St. L. A. & T. H. R. R. Co.*, 21 N. E. 487).

In *Downen v. Rayburn*, 214 Ill. 342, 73 N. E. 634, which is representative of the cases cited, the Court had under consideration a warranty deed from Downen and wife to certain church trustees conveying

> "A certain tract of land *to be used as a church location,* situated * * *."

The rules of interpretation applicable to this language would seem equally applicable to the conveyance of

> "A certain tract or parcel of land *to be used as a railroad right of way,* situated * * *."

Quoting from the Illinois decision referred to:

> "It is well settled that where real property is conveyed in fee restrictions in the use are not favored, although courts will enforce such restrictions where the intention of the parties is clear in the creation of restrictions or limitations upon the use of a grant. It is also well settled that 'in the construction of deeds containing restrictions and prohibitions as to the use of property by a grantee *all doubts should, as a general rule, be resolved in favor of a free use of property, and against restrictions.*' * * * It will be noticed that the words in question, 'to be used as a church location,' stand alone, and that the words 'upon condition' are not used in connection therewith. That is to say, it is not stated in the deed that the premises are conveyed upon condition that they are to be used as a church location. Nor is there any provision in the deed for re-entry by the grantor in case of a breach of the covenant, if it be a covenant, that the premises are to used as a church location. * * *
>
> "Here the words in question, 'to be used as a church location,' are merely declaratory of 'the purpose of the conveyance.' It cannot be said, therefore, that they render the estate conditional."

The opinion of the Court of Appeals sought to be reviewed hurdles these Illinois decisions and starts with the assumption that the deeds in question were intended to convey merely easements. With this premise the Court then argues that the Illinois rules of construction applicable to limitation of fees are not applicable to the conveyance of easements. Quoting, by way of illustration, from the opinion under consideration (R. 176):

> "Words, therefore, which if used in a deed granting a fee, may be regarded as surplusage, if used in a deed granting an easement, may constitute the essential description of the thing intended to be conveyed."

After admitting the holdings of the Illinois courts above referred to, the Court of Appeals states (R. 179):

> "Counsel in effect concede that the issue involved in each of these cases [Illinois decisions cited] was whether the deeds granted a fee or a conditional fee, *while in the present case the question is whether the instruments convey a fee or a railroad right-of-way easement.*"

Further quoting from the Court of Appeals' opinion (R. 180):

> "It must be true according to the rules of construction of deeds prevailing in Illinois and recited above that the only purpose of construction is to determine the intent of the parties, or more particularly, of the grantor. This is true when the dispute is whether the grant is of a fee or a conditional fee, as well as when the question is whether it is a fee or an easement. *But when the court examines the writing to discover the grantor's intent as expressed therein, the inquiry is not the same in the two cases.*"

This reasoning is fallacious. A railroad right of way "is neither a mere easement nor a fee simple absolute,

but a limited fee." This Court has so held in *Rio Grande Western Ry. Co. v. Stringham*, 239 U. S. 44, 47, and there is no authoritative Illinois decision to the contrary. In determining whether the deeds in question convey the fee simple absolute or merely a limited fee in the nature of an easement, we must first turn to the authoritative Illinois decisions to determine whether such language is considered sufficiently ambiguous to justify application of rules of construction; and finding this to be true, we must then apply the foregoing authoritative Illinois decisions, resolving the doubt in favor of the grantee and in favor of the fee simple absolute conveyance. In the light of these Illinois decisions the language "*for railroad right of way,*" following the conveyance of a strip of ground, is merely descriptive of its use for the purpose of definitely locating the particular strip of ground in question, and no other interpretation can be reconciled with the foregoing authoritative Illinois decisions.

What the Appellate Court has to say with respect to the interpretation of deeds conveying easements is entirely beside the point, for the reason that the real question at issue is not how a deed conveying an easement is to be interpreted, but whether these deeds convey easements.

In support of its conclusion the Court of Appeals, in the decision sought to be reviewed, states (R. 180):

> "The Supreme Court of Illinois did not ignore words descriptive of the purpose of the grant when it became necessary to determine the issue of whether a deed operated as a conveyance of a fee or of an easement in *Waller v. Hilderbrecht*" [295 Ill. 116, 128 N. E. 807].

The case cited is irrelevant. The facts were:

> "Andrew Michaels and wife executed a warranty deed conveying for a stated consideration of two

thousand dollars the east 10 feet of Lot 7 and the south 10 feet of Lot 6 to William Grus, husband of Mary A. Grus, *'to be used as alley, only, in common by both parties thereto.'* "

Quoting from the opinion:

"In her answer to appellee's bill to quiet title, *appellant claimed no more than an easement* in this tract of land. The appellant by her answer, which by stipulation stood as her cross bill, *did not claim to be the owner in fee* of this piece of property * * *."

In the light of these facts and admissions, the Court said:

"Generally speaking, where a particular or special right or easement in land is conveyed, which may well co-exist and be enjoyed and used by the grantee consistently with the ownership of the fee in the grantor, the fee does not pass because it is not essential to the right or interest which is described in the deed."

In the case referred to, the conveyance was for alley purposes *only*, and appellant claimed no more than an easement in the tract of land. The distinction is obvious, and yet this is the one case that the Court of Appeals has cited attempting to justify its utter disregard of the authoritative Illinois decisions hereinabove referred to.

Failures of Courts of Appeals to follow and apply the authoritative decisions of the state courts in cases of this kind have repeatedly been held to justify the granting of certiorari (*Forsythe v. City of Hammond*, 166 U. S. 506, 514). We assume from certain statements appearing in the opinion that the Court of Appeals reached the conclusion that the Illinois decisions referred to were not controlling upon the erroneous assumption that the conveyance of an easement for railroad purposes constituted something entirely different from the conveyance of the

limited or conditional fees referred to in the Illinois cases cited. If we are correct in this assumption, then the failure of the Court of Appeals to follow this Court's decision in *Rio Grande Western Ry. Co. v. Stringham*, 239 U. S. 44, 47, to the effect that a railroad right of way *is a limited fee*, warrants the granting of this application for certiorari *(Joplin Merc. Co. v. U. S.*, 236 U. S. 531).

JURISDICTION OF THE BANKRUPTCY COURT INVOLVED.

If the Court of Appeals in the decision sought to be reviewed has correctly concluded that the petitioner has merely an easement for railroad purposes, then two important jurisdictional questions arising under the Federal Bankruptcy Act are presented.

(1) The first of these questions is whether *mere possession*, as distinguished from *adverse possession*, is sufficient to give the Bankruptcy Court jurisdiction. The Illinois courts have held that the owner of an easement does not hold adversely to the owner of the fee within the contemplation of the statutes relating to title by adverse possession. On the other hand, as stated by this Court in *Western Union v. Penn. R. Co.*, 195 U. S. 540, 570:

> "A railroad right of way is a very substantial thing. *It is more than a mere right of passage.* It is more than an easement. * * * A railroad right of way has therefore the substantiality of the fee, and is private property, even to the public, in all else but the interest and benefit in its uses."

If we correctly understand the decisions of this Court, a railroad right of way is a fee limited in use to railroad purposes, and with a right of reverter upon discontinuance of the use for railroad purposes.

We therefore respectfully submit that while a railroad company which has acquired a mere easement does not hold adversely to the owner of the mineral rights underlying the right of way, yet the railroad easement does imply at least limited possession of the subsoil sufficient to prevent the removal of the subsoil or other interference with its use for railroad purposes. Possession of such an easement is therefore possession of the mineral and oil underlying the right of way at least to the extent of giving the Bankruptcy Court jurisdiction to determine ownership.

This important question of federal law, while directly involved in this case, was not discussed in the opinion of the Court of Appeals, and so far as we can find, has not heretofore been presented to this Court. In view of the large number of railroads now in process of reorganization under the Federal Bankruptcy Act, the question is of such importance as to justify the granting of certiorari in this case.

(2) The second jurisdictional issue which was brushed aside by the Court of Appeals involves the right of the Bankruptcy Court as a preliminary inquiry *to determine its own jurisdiction to proceed to examine and decide in a summary proceeding the merits of an adverse claim.*

As stated by this Court in *Traubel-Scott-Kitzmiller Co., Inc., v. Fox et al., Trustees,* 264 U. S. 426, 432:

> "As every court must have power to determine, in the first instance, whether it has jurisdiction to proceed, the bankruptcy court has, in every case, jurisdiction to determine whether it has possession, actual or constructive. It may conclude, where it lacks actual possession, that the physical possession held by some other persons is of such a nature that the property is constructively within the possession of the court."

Intricate legal questions were involved in determining Trustee's possession, upon which it was contended the Court's jurisdiction depended, and pending the determination of this question of possession and its review on appeal the Bankruptcy Court, we respectfully submit, had jurisdiction to enter appropriate orders conserving the subject matter of litigation.

The District Court specifically found (R. 58):

> "(b) That immediate action is necessary to conserve the oil supply underlying said property for the benefit of the parties in interest as their rights, title and interest thereto may hereafter be determined by this Court;
>
> "(c) That this Court has authority to direct that the expenses thereof be borne, in so far as possible, out of the proceeds of the oil so removed."

No assignment of error was urged by appellants against this finding of the Bankruptcy Court.

There is ample authority warranting the action of the District Court in directing that the oil be removed from under the right of way and the proceeds from the sale retained as a trust fund for the account of whom concerned (*Malone v. Barnett*, 87 S. W. [2] 523 [Texas]; *Chancellor v. Guerra*, 85 S. W. [2] 663 [Texas]; *United North & South Oil Co. v. Meredith*, 258 S. W. 550 [Texas]; *Ohio Fuel Oil Co. v. Burdett*, 72 W. Va. 803, 79 S. E. 667; *Oklahoma v. Texas*, 252 U. S. 372, and 253 U. S. 465).

The importance of these jurisdictional questions arising under an act of Congress is, we respectfully submit, sufficient to justify the granting of this petition for certiorari.

THE OPINION IS IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Differences of opinion arose as to the meaning of the words "over and across," as used in the granting clause of the deed, to wit (R. 167):

> "A strip of land for right of way of said Railroad Company 60 ft. wide *over and across* the Southwest Quarter * * *"

Do the words "over and across" modify "a strip of land," or do they modify the words "right of way"? Either interpretation might be justified.

But in the Rusler deed appears the further language (R. 167):

> "* * * it being the strip of land over and across said above-described tracts of land where the said railroad is now located."

The Court of Appeals in the opinion sought to be reviewed apparently reasons that the strip of land referred to is over something, and that it was therefore not the intention to convey the subsoil and mineral rights. If this be the conclusion the Court of Appeals has sought to convey, then it is in direct conflict with the decision of the Circuit Court of Appeals of the Fifth Circuit in *Kynerd v. Hulen*, 5 Fed. (2) 160, 162, wherein the Court said:

> "Plaintiff's whole case is built upon the use of the one word 'over.' It is argued that the use of that word demonstrates that there was something 'under' which was not being conveyed, and which later turned out to be oil. In our opinion, 'over' is synonymous with 'through' and 'through and over' conveys no

meaning different from what would have been expressed if the words 'and over' had been left out."

Conflict between decisions of Courts of Appeals is a recognized ground for the granting of certiorari.

Respectfully submitted,

RUSSELL L. DEARMONT,
THOS. T. RAILEY,
Attorneys for Petitioner.